STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 8, 2005
v	No. 248199 Berrien Circuit Court
RAYMOND LEE KYLE, Defendant-Appellant.	LC No. 02-400252-FC

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), second-degree murder, MCL 750.317, manslaughter, MCL 750.321, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, arson of a dwelling house, MCL 750.72, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life imprisonment for the first-degree murder conviction, 450 to 750 months' imprisonment for the second-degree murder conviction, 100 to 180 months' imprisonment for the manslaughter conviction, 67 to 120 months' imprisonment for the assault with intent to do great bodily harm less than murder convictions, and 140 to 240 months' imprisonment for the arson of a dwelling house conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. We affirm.

I. Facts

Defendant was married, but was having an extra-marital affair with Sheila Taylor, who lived with her brother, Charles Taylor, and her three children: twelve-year-old Dontrael Smith, ten-year-old Nicholas Taylor, and eight-year-old Shaquill Crayton. Sometime after midnight on January 11, 2002, defendant went to Sheila's house and the two had an argument. Sheila called Alice Palmer for assistance and asked her to come over to the house.

Sometime during the night, the children woke up to a loud noise like somebody falling on the floor. Nicholas got out of bed and went to see what was happening. Sheila and Palmer were lying motionless on the floor, Charles was on the floor in his bedroom screaming, and defendant was going through the kitchen drawer looking for a knife. When defendant saw Nicholas, defendant punched him and hit him in the head with a clothes iron. Defendant then pulled out a knife and stabbed Nicholas in the chest. Defendant followed Nicholas to the children's bedroom

where he stabbed Dontrael in the shoulder. Defendant then went into Charles' room, and the children heard Charles screaming and repeatedly yelling, "Quit." Defendant then loaded the children into Palmer's car and drove them to a nearby dirt road and forced them at gunpoint to get into the trunk of the car. Defendant drove the children back to their house and left them in the trunk of the car with the engine running, the radio playing, the headlights on, and the windshield wipers on.

Firefighters responded to a call that Sheila's house was on fire and arrived on the scene at 5:12 a.m. Inside the house, firefighters found the dead bodies of Sheila, Charles, and Palmer. Sheila's body was very badly burned, and had a gunshot wound that passed through her arm into her chest, a stab wound in the arm, and significant hemorrhages in her head. Palmer's body had a gunshot wound that passed through her arms and torso and a bruise over her eye. Charles' hands and feet were bound, and his body was burned and had three gunshot wounds, four stab wounds, and multiple bludgeoning wounds to the head. Police also found four knife handles with the blades broken off and three spent shell casings from a .357 caliber Sig Glock handgun. A fire investigation expert testified that the fire had been intentionally set at approximately 4:45 a.m. and had three causes: (1) the introduction of flammable liquid onto Sheila's body, (2) the introduction of flammable liquid onto Charles's body, and (3) the introduction of a towel onto the hot burner of the stove (Tr II, p 470).

After the firefighters extinguished the fire, they searched the perimeter of the house and discovered the children in the trunk of Palmer's car. Dontrael had a blade sticking out of his shoulder and had severe laceration wounds on his arm. Nicholas had laceration wounds on his head and chest. Shaquill had superficial wounds, including a small cut and abrasion on his stomach.

II. Analysis

A. Sufficiency of the Evidence

Defendant argues that the prosecution failed to present sufficient evidence to support any of his convictions. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). We must draw all reasonable inferences and make credibility choices in support of the jury verdict. *Id.* at 400. "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

1. Identity

Defendant first argues that there is insufficient evidence to prove that he was the person who committed the crimes. We disagree. The evidence showing that defendant was the perpetrator is overwhelming. Several witnesses testified that defendant was at Sheila's house the morning of the murders. Nicholas and Dontrael actually saw defendant at the house and were attacked by defendant. Nicholas heard Charles screaming as defendant attacked him. Nicholas and Dontrael indicated that Sheila and Palmer were laying motionless on the floor while

defendant was in the house. Sheila had been shot by a nine millimeter handgun—the type of handgun that the police found in defendant's motel room when he was arrested. The police also found spent shell casings from a .357 caliber Sig Glock handgun at the crime scene and at defendant's house and found a .357 caliber Sig Glock stained with Charles' blood at defendant's house. The police found a can of disinfectant spray in Palmer's car that was stained with Charles' blood and was marked with defendant's fingerprints. The children were rescued from the trunk of Palmer's car, which had defendant's handprint on it. Before he was arrested, defendant told police that he had "f**ked up last night." When he was arrested, defendant stated several times that he "just couldn't kill those kids." Defendant's brother also told police that defendant had admitted to him that he was guilty and had put the children in the trunk of a car but could not kill them.

In a statement to police, defendant admitted that he went to Sheila's house and saw her and Palmer. He then blacked out, but when he came to, he saw the dead bodies of Sheila, Palmer, and Charles, and saw Dontrael with a knife in his shoulder. Charles' body was on fire. He remembered seeing a gun in his own hand. Defendant admitted that nobody else entered the house while he was there and that nobody else could have committed the crimes but himself. Defendant admitted that it was possible that he snapped under pressure. Defendant told police that when he returned home, he told Renell that he had killed "them," but could not kill the kids. There is no evidence supporting a theory that someone other than defendant committed the crimes. The evidence was sufficient to prove that defendant was the perpetrator of the crimes.

2. First-Degree Premeditated Murder

Defendant argues that there is insufficient evidence to support his first-degree murder conviction for the killing of Charles because there is no evidence that he premeditated Charles' killing.

> In order to convict defendant of first-degree, premeditated murder, the prosecution was required to prove that defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). "The elements of premeditation and deliberation may be inferred from circumstances surrounding the killing." *Id.* Minimal circumstantial evidence is sufficient to prove an actor's state of mind. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). [*People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002).]

"Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 237; 531 NW2d 780 (1995). "Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Id.*

Here, defendant carried a gun when he went to Sheila's house. Defendant killed Sheila and Palmer and then went to work killing Charles. Defendant shot Charles three times, stabbed him four times, and bound his hands and feet, but Charles did not die until defendant finally bludgeoned him in the head multiple times with a large metal can. Meanwhile, Charles was screaming and repeatedly yelling for defendant to "quit." The manner of Charles' death gave

defendant numerous opportunities for a second look at his actions. Furthermore, defendant tried to cover up the crime by burning Charles' body and then tried to elude capture by fleeing the scene and hiding in a motel. Given defendant's actions before, during, and after he killed Charles, a reasonable juror could find that Charles' killing was deliberate and premeditated.

3. Second-Degree Murder

Next, defendant argues that there is insufficient evidence to support his second-degree murder conviction for the killing of Palmer because there is no evidence that he intended to kill her. The elements of second-degree murder are: "(1) death, (2) caused by defendant's act, (3) with malice, and (4) without justification." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Here, defendant shot Palmer in the arm, and the bullet passed through her torso and exited her other arm, killing her. Malice can be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *Carines, supra* at 759. "Malice may also be inferred from the use of a deadly weapon." *Id.* Because defendant shot Palmer and two other victims with a deadly weapon, the jurors could infer malice. Thus, there was sufficient evidence to support defendant's second-degree murder conviction.

4. Manslaughter

Next, defendant argues that there is insufficient evidence to support his manslaughter conviction for the killing of Sheila because there is no evidence that defendant possessed the requisite state of mind. "Manslaughter is murder without malice." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). Here, defendant went to Sheila's house and took a gun inside. After defendant and Sheila got into an argument, defendant stabbed her in the arm, fatally shot her, and then burned her body. This evidence is sufficient to support defendant's manslaughter conviction.

5. Assault With Intent To Do Great Bodily Harm Less Than Murder

Next, defendant argues that there is insufficient evidence to support his assault with intent to do great bodily harm less than murder convictions with regard to his assaults of Dontrael and Nicholas because the injuries to the children "were not life-threatening and were not severe." "The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force or violence to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder." *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod in part on other grounds 457 Mich 885 (1998).[1] "The term 'intent to do great bodily harm less than the crime of murder' has been defined as an intent to do serious injury of an aggravated nature." *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

[1] Although defendant argues that, "If the defendant wanted to kill the children, he could have done so," intent to kill is not an element of assault with intent to do great bodily harm less than murder.

Here, defendant punched Nicholas, hit him in the head with a clothes iron, and then slashed his chest with a knife. Defendant then went into the children's bedroom and stabbed Dontrael in the arm and shoulder. A doctor testified that both of the children's injuries were potentially life-threatening. From this evidence, a reasonable juror could infer that defendant intended to cause the children serious injuries of an aggravated nature. Therefore, the evidence was sufficient to support defendant's assault with intent to do great bodily harm less than murder convictions.

6. Arson

Next, defendant argues that there is insufficient evidence to show that he started the fire that led to his arson conviction. The applicable arson statute provides, in pertinent part: "Any person who willfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof . . . shall be guilty of a felony . . . ." MCL 750.72. Here, the fire investigation expert testified that the fire had been intentionally set at approximately 4:45 a.m., the time that defendant was at the house. Flammable liquid had been introduced to the bodies of Sheila and Charles, and a towel had been placed on a hot stove burner. Defendant himself told police that parts of the house and Charles' body were on fire while he was there and that nobody else had entered the house while he was there. Defendant admitted to police that nobody could have committed the crimes but himself. From this evidence, a reasonable juror could conclude that defendant had set the fires in order to cover up the evidence that he had murdered Sheila, Charles, and Palmer.

7. Felony-Firearm

Finally, defendant argues that there is insufficient evidence to support his felony-firearm conviction because there is no evidence that he possessed a firearm while he committed the felonies. "'The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.'" *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003), quoting *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Here, defendant admitted to the police that he took a gun to Sheila's house. All three victims were shot. Forensic evidence linked the guns found in defendant's home and motel room to the crime scene and the killings. Defendant admitted to the police that he was holding a gun in his hand after the victims were killed. From this evidence, a reasonable juror could find that defendant used a firearm when he committed the crimes.

B. Nicholas' Prior Inconsistent Statement

Defendant argues that the trial court erred by instructing the jury that Nicholas' prior inconsistent statement to police could not be considered as substantive evidence. We review this unpreserved claim of instructional error for plain error affecting defendant's substantial rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). In order to show that his substantial rights were affected, the defendant must show prejudice, "i.e., that the error affected the outcome of the lower court proceedings." *Carines, supra* at 763. "This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). We will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*" *Gonzalez, supra* at 225.

Nicholas told police that he saw Charles "stomping" on defendant while defendant was on the floor. Charles also hit defendant with a vacuum cleaner. Sheila then came into the room and hit defendant with a frying pan.[2] Nicholas told police that he retrieved a pair of brass knuckles from the basement and struck defendant with them after he saw defendant hit Sheila.[3] Nicholas' statement to police was inconsistent with his trial testimony, where he testified that: (1) he did not see Charles "stomping" on defendant or hitting him with a vacuum cleaner; (2) he did not see Sheila wielding a frying pan; and (3) he did not retrieve brass knuckles or hit defendant with brass knuckles. At trial, defendant used Nicholas' statement to police to support his argument that he committed the crimes in self-defense.

Defendant concedes that Nicholas' statement to police was hearsay, but nonetheless argues that the trial court should have instructed that the statement was admissible as substantive evidence, rather than just for impeachment purposes. There is no dispute that Nicholas' prior inconsistent statement to police was properly admitted for impeachment purposes under MRE 613(b).[4] See *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998); *People v Stanaway*, 446 Mich 643, 692; 521 NW2d 557 (1994). But defendant argues that Nicholas' statement to police was substantively admissible because the prosecutor did not object to the admission of the statement. Defendant cites *People v Maciejewski*, 68 Mich App 1; 241 NW2d 736 (1976), in support of this argument. In *Maciejewski, supra* at 3, this Court stated, "Hearsay evidence which has been admitted without objection is entitled to consideration by an appellate court in support of the trial court's findings in a criminal case." However, the prosecution did not object to the admission of Nicholas' statement to police for impeachment purposes because it was properly admitted under MRE 613(b). *Maciejewski, supra*, does not stand for the proposition that hearsay evidence that is properly admitted for impeachment purposes is transformed into substantively admissible evidence when the evidence is admitted without objection.

Defendant also argues that the trial court erred in instructing the jury that Nicholas' prior statement to police was not substantively admissible because the statement was admissible under three exceptions to the hearsay rule. Defendant first argues that Nicholas' statement was admissible as a present sense impression under MRE 803(1)[5] and an excited utterance under

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[2] A search of the house did not reveal a pan that had been used as a weapon.

[3] No brass knuckles were ever recovered from Sheila's house.

[4] MRE 613(b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

[5] A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1).

MRE 803(2).[6] However, Nicholas made his statement to police in the hospital well after he witnessed the events surrounding the crimes. The questioning officer testified that Nicholas appeared to be calm when he made the statement. Therefore, the trial court did not plainly err in determining that neither the present sense nor excited utterance exceptions to the hearsay rule applied.

Defendant also argues that Nicholas' statement was admissible under the catch-all exception to the hearsay rule, MRE 803(24).[7] However, defendant fails to cite any authority in support of his position other than the court rule itself and does not specifically explain why MRE 803(24) applies in this case. Defendant has waived this argument by giving it such cursory treatment. See *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 251-252; 673 NW2d 805 (2003). The trial court did not commit a plain error affecting defendant's substantial rights when it instructed the jury to consider Nicholas' prior inconsistent statement to police for impeachment purposes only.

C. *Batson* Issue

Defendant argues that the prosecutor violated his right to the equal protection of law by improperly using peremptory challenges to exclude African-Americans from the jury panel. "This Court reviews for abuse of discretion a trial court's ruling regarding discriminatory use of peremptory challenges." *People v Eccles*, 260 Mich App 379, 387; 677 NW2d 76 (2004). This Court must "give great deference to the trial court's findings because they turn in large part on a determination of credibility." *Id.*

A prosecutor's use of a peremptory challenge to strike a potential juror solely on the basis of his race violates the Equal Protection Clause of the Fourteenth Amendment, US Const, Am XIV. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Under *Batson*,

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[6] An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2).

[7] MRE 803(24) provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

supra at 96-97, the defendant must first present a prima facie case of racial discrimination by (1) showing that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of that racial group from the jury pool, and (2) articulating facts to establish an inference that the prosecutor used peremptory challenges to exclude one or more potential jurors from the jury on the basis of race. Once a prima facie case of discrimination is established, the burden of production shifts to the prosecutor to come forward with a race-neutral explanation for challenging those jurors. *Id.* at 97-98. If the prosecutor provides a race-neutral explanation for the challenge, the trial court must then decide whether the opponent of the challenge has proved purposeful racial discrimination. *Id.* at 98; *Hernandez v New York*, 500 US 352, 358-359; 111 S Ct 1859; 114 L Ed 2d 395 (1991).

Here, the prosecutor used peremptory challenges to dismiss three African-American jurors (Juror 46, Juror 48, and Juror 59). Defendant argues that the prosecutor failed to provide race-neutral explanations for challenging two of these jurors (Juror 46 and Juror 59). Assuming that defendant established a prima facie case of racial discrimination, we conclude that the trial court did not abuse its discretion in finding that the prosecutor provided valid race-neutral explanations for challenging those jurors. First, that the prosecutor declined to exercise all of his peremptory challenges to remove all of the African-Americans from the jury is strong evidence against a showing of discrimination. *Eccles, supra* at 387-388.

The prosecutor explained that he dismissed Juror 46 because she had not reported on her juror questionnaire that she had convictions for disorderly conduct, having an illegal occupation, and three counts of truancy. The prosecutor indicated that he did not want jurors who were not honest about their prior criminal records. This was a valid race-neutral reason for dismissing Juror 46.

Juror 59 indicated that her mother had been paralyzed when she was stabbed in the back by her ex-boyfriend. Juror 59's brother was convicted of assault with intent to do great bodily harm, her cousin was charged with first-degree murder, her other cousin had a drug conviction. Juror 59 indicated that she could "just keep going" about her relatives that had been charged with crimes. The prosecutor stated that he dismissed Juror 59 because her family members had been charged with serious crimes and her mother had been the victim of a crime. The prosecutor indicated that he did not want jurors who had family members who had been charged with serious crimes. Thus, the prosecutor articulated a race-neutral reason for dismissing Juror 59. Therefore, the trial court did not abuse its discretion in allowing the prosecutor to use peremptory challenges to dismiss Jurors 46 and 59.

D. Re-Cross-Examination of Witnesses

Defendant argues that the trial court violated his constitutional right to confrontation by prohibiting him from re-cross-examining the witnesses after the witnesses were done answering the jurors' questions. Because defendant failed to object on the record to this practice, this issue was not properly preserved for appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Unpreserved constitutional issues are reviewed for plain error affecting the defendant's substantial rights. *Carines, supra* at 774.

All criminal defendants have the right "to be confronted with the witnesses against him." US Const, Am VI; Const 1963, art 1, § 20. "[T]he principal protection provided by the

Confrontation Clause to a criminal defendant is the right to conduct cross-examination." *People v Gearns*, 457 Mich 170, 186; 577 NW2d 422 (1998), overruled on other grounds *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999), citing *Pennsylvania v Ritchie*, 480 US 39, 51; 107 S Ct 989; 94 L Ed 2d 40 (1987); *Delaware v Fensterer*, 474 US 15, 18-19; 106 S Ct 292; 88 L Ed 2d 15 (1985). However, "[n]either the Sixth Amendment's Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). The Confrontation Clause only guarantees "'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish.'" *People v Bushard*, 444 Mich 384, 391; 508 NW2d 745 (1993), quoting *Fensterer*, *supra* at 20; *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986) (emphasis deleted).

Here, defendant was given the opportunity to cross-examine and re-cross-examine all of the witnesses against him. Once defendant was done with his questions, the trial court allowed the jurors to ask the witnesses questions, but did not allow defendant to re-cross-examine the witnesses after they answered the jurors' questions. Nonetheless, defendant was given the opportunity to fully cross-examine the witnesses before the jurors submitted their questions. Furthermore, defendant has not demonstrated that the alleged error affected the outcome of the trial. In fact, defendant concedes that, "It's true the defense cannot show exactly what other questions could have been asked, what other information would have been elicited, or if it would have made a difference to the jury." Therefore, any alleged error did not affect defendant's substantial rights.

E. Voluntariness of Defendant's Confession

Defendant argues that the trial court abused its discretion in denying defendant's motion to suppress his confession.

> This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). Although this Court engages in a review de novo of the entire record, this Court will not disturb a trial court's factual findings with respect to a *Walker* hearing unless those findings are clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). "A finding is clearly erroneous if it leaves us with a definite and firm conviction that the trial court has made a mistake." *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000). [*Akins*, *supra* at 563-564.]

Defendant first contends that his statement to police should have been suppressed because he was not given *Miranda*[8] warnings before he made the statement. Defendant contends that the trial court clearly erred in its factual finding that the police gave defendant his *Miranda* warnings before he made his statement. However, two police officers testified at the *Walker*[9]

[8] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[9] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

hearing that defendant was in fact properly given *Miranda* warnings before he made his statement. The trial court is in the best position to assess the credibility of the witnesses. *Daoud, supra* at 629. We are not left with a definite and firm conviction that it was a mistake for the trial court to believe the officers' testimony.

Defendant next argues that his statement to police was involuntary because he was upset when he made the statement.

> A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *Daoud, supra* at 632-639. A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception, *id.* at 633, and must be the product of an essentially free and unconstrained choice by its maker. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The burden is on the prosecution to prove voluntariness by a preponderance of the evidence. *Daoud, supra* at 634. In *Cipriano, supra* at 334, our Supreme Court set forth a nonexhaustive list of factors that should be considered in determining the voluntariness of a statement:
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> > "[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse."
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> No single factor is necessarily conclusive on the issue of voluntariness, and "[t]he ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.* [*Akins, supra* at 564-565.]

When defendant made his confession to police, he was visibly upset. He indicated to police that he had contemplated suicide. However, despite defendant's emotional state when he made the confession, the following factors favored the trial court's determination that defendant's waiver of his Fifth Amendment rights and his subsequent confession were voluntary: (1) The questioning officer testified that defendant was not so upset that the was incapacitated or unable to communicate or understand what was going on; (2) when defendant cried during the interview, the police stopped questioning him and waited for him to compose himself; (3) defendant was cooperative with police when he made the statement; (4) there is no evidence that the police threatened defendant with abuse; (5) defendant was old enough to be married and have two children; (6) defendant was not under the influence of drugs or alcohol; (7) there is no evidence that defendant was tired, hungry, or thirsty when he made the statement; (8) defendant's confession was made approximately one hour after his arrest; (9) defendant was

given *Miranda* warnings and signed a card listing these warnings before he made his confession; (10) there is no evidence that defendant asked to talk to an attorney before he made the statement; and (11) the questioning only lasted about thirty minutes. Applying the *Cipriano* factors, we conclude that the trial court did not abuse its discretion in concluding that defendant's confession was voluntary and admissible at trial.

F. Prosecutorial Misconduct

Defendant argues that he was denied a fair trial by several instances of prosecutorial misconduct. This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003).[10] "The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial." *Goodin, supra* at 432.

1. Reasonable Doubt Comment

Defendant first argues that the prosecutor engaged in misconduct by mischaracterizing the concept of "beyond a reasonable doubt." During voir dire, the prosecutor told the jurors that their decision regarding defendant's guilt was just as important as decisions such as getting married, having children, and buying a house. The prosecutor stated that "when you make those decisions, you probably don't make those decisions on the basis of beyond all doubt or beyond the shadow of a doubt, you make it on beyond a reasonable doubt."

We conclude that the prosecutor's comments were not improper. They were not an attempt to redefine reasonable doubt, but were an attempt to explain to prospective jurors that, like other important decisions, their decision regarding defendant's guilt could not be made without any doubt whatsoever. Further, the trial court mitigated any prejudice caused by the defendant's comment when it gave jurors a reasonable doubt instruction at the end of the trial.

2. Comment Regarding Nicholas' Statement to Police

Next, defendant argues that the prosecutor acted improperly by arguing during his closing argument that Nicholas' prior inconsistent statement to police could only be used for impeachment purposes. However, as discussed in Part II(B) of this opinion, the prosecutor's statement was accurate.

3. Eliciting Testimony Regarding the Extent of Police Involvement

[10] Defendant incorrectly argues that the "harmless error analysis should not be applicable because the defendant's constitutional rights have been violated." Our Supreme Court has explained that unpreserved constitutional error is reviewed for plain error affecting the defendant's substantial rights. *Carines, supra* at 774. In order to show that his substantial rights were affected, the defendant must show prejudice, "i.e., that the error affected the outcome of the lower court proceedings." *Id.* at 763.

Next, defendant argues that the prosecutor engaged in misconduct by eliciting irrelevant and prejudicial testimony from police officers that there were a large number of officers involved in the search for and arrest of defendant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Here, the evidence surrounding defendant's flight and arrest was relevant. "[E]vidence of flight is admissible to support an inference of 'consciousness of guilt' . . . ." *Goodin*, *supra* at 432. Evidence of defendant's arrest was relevant because police found a nine millimeter handgun and ammunition during the arrest—the kind of gun used to shoot and kill Sheila. Defendant also stated during his arrest that he tried to kill the children, but couldn't do it. In explaining the circumstances surrounding the search for defendant and his arrest, the officers naturally discussed the police officers involved. This testimony was not unfairly prejudicial to defendant because the jurors would most likely assume that a large number of police would be involved in defendant's arrest, given the seriousness of his crimes. Defendant has not shown how this testimony prejudiced him in any way. Therefore, the prosecutor did not engage in misconduct by questioning the officers regarding the search for defendant and his arrest.

4. Comment Regarding Arson and Self-Defense

Next, defendant argues that the prosecutor improperly argued facts not in evidence by making the following statement during his closing argument:

> [D]oes a man who acts in lawful self-defense, does a man who acts reasonably and honestly try to destroy the scene? Try to burn the bodies, destroy the evidence, to think about killing the kids so that there are no witnesses? Does that sound reasonable to you?

"A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence in the case." *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992).

We reject defendant's argument that the prosecutor's statements were improper. The prosecutor's statement is supported by the evidence—there is evidence that defendant burned the bodies of the victims and thought about killing the children in the house. The prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor was merely arguing that one who has killed three people in self-defense would not likely burn the bodies of the victims to destroy evidence of his conduct. This was a permissible inference for the prosecutor to argue. Moreover, defendant does not explain how the prosecutor's statement affected the outcome of the case.

5. Inviting the Jury to Speculate

Next, defendant argues that the prosecutor improperly invited the jury to speculate. In particular, during his opening statement, the prosecutor stated that "it's a possibility that perhaps

two guns were used at this house. We don't know. It will be up for you to judge." The prosecutor also stated that the spent slug taken from Sheila's body "could have been and may have been consistent with the ammunition that fell out of Raymond Kyle's pocket, at the Super 8 Motel, when he was arrested." The prosecutor's statements were merely meant to inform the jurors what evidence he anticipated that he would introduce at trial and what conclusions the jurors might form from this evidence. The prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to his theory of the case. *Bahoda, supra* at 282. Further, defendant has not demonstrated how this statement affected the outcome of the case.

6. Denigration of Defense Counsel

Next, defendant argues that the prosecutor improperly denigrated defense counsel when he made the following statement during closing argument: "The burden is on me to prove this case beyond a reasonable doubt. It's not beyond all doubt, because there is some doubt in every case. . . . But that's what counsel is attempting to make you do right now. He is [at]tempting to make you believe that we have got to prove this case beyond all possible doubt."

"The prosecutor may not question defense counsel's veracity." *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984).

> When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. [*Id*. at 102]

Here, the prosecutor was not questioning defense counsel's veracity, but was merely making a proper response to defense counsel's argument that the jury should find defendant not guilty because the police and other government agencies did not do everything possible to prove defendant's guilt. "A prosecutor's comments must be considered in light of defense arguments." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Furthermore, defendant has not shown how the prosecutor's statement affected the outcome of the trial.

7. Cumulative Effect

Defendant argues that the cumulative effect of the prosecutor's misconduct denied him of a fair trial, even if no single instance did so. However, because we conclude that the prosecutor did not engage in any instances of misconduct, defendant's argument fails.

G. Ineffective Assistance of Counsel

Defendant argues that his trial counsel was ineffective for several reasons. Because defendant did not preserve this issue by moving for a new trial or an evidentiary hearing in the trial court, our review is limited to the facts on the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich

575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's findings of fact for clear error. MCR 2.613(C); MCR 6.001(D); *LeBlanc, supra* at 579. Questions of constitutional law are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, the defendant must first show that the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must show that his attorney made errors so serious that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant bears the heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Carbin, supra* at 600. In addition to showing counsel's deficient performance, the defendant must show that the representation was so prejudicial to him that he was denied a fair trial. *Toma, supra* at 302. In order to show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Carbin, supra* at 600. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland, supra* at 694.

1. Failure to Object

Defendant first argues that his counsel was ineffective for failing to object to: (1) the trial court's instruction that Nicholas' prior statement to police could only be considered for impeachment purposes; (2) the trial court's prohibiting defense counsel from cross-examining witnesses after the witnesses answered the jurors' questions; and (3) the numerous instances of prosecutorial misconduct. However, as discussed, *supra*, such objections would have been futile. Defense counsel was not required to raise meritless or futile objections. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

2. Cross-Examination of the Officer Who Questioned Nicholas

Next, defendant argues that his trial counsel was ineffective for eliciting testimony that the police officer who questioned Nicholas believed that Nicholas was embellishing parts of his statement to police regarding the events surrounding the crimes. Specifically, defense counsel asked:

> *Q*. And in this particular case did you get the impression that Nicholas Taylor was just embellishing or adding things?
>
> *A*. To be honest, yes, I did, when he proceeded to get into the portion of the fight with the parents.

Defendant contends that because Nicholas' statement to police described Charles "stomping" on defendant and hitting him with a vacuum cleaner, Sheila hitting defendant with a frying pan, and Nicholas punching defendant with brass knuckles, the officer's testimony that he believed

Nicholas to be embellishing his story undercut the defense theory of self-defense. However, Nicholas' statement to police was admitted for impeachment purposes only and not as substantive evidence. Defense counsel apparently asked the officer about Nicholas embellishing his story in an effort to further undermine Nicholas' credibility as a witness. "This Court does not substitute its judgment for counsel's judgment regarding trial strategy." *People v Kevorkian*, 248 Mich App 373, 414; 639 NW2d 291 (2001). That the strategy ultimately failed does not constitute ineffective assistance of counsel. *Id.* at 414-415.

3. Admission of the Gun Found in Defendant's House

Next, defendant argues that his trial counsel was ineffective for failing to move to suppress the .357 caliber Sig Glock handgun the police found in his house. Defendant contends that the police officers' search of his house exceeded the scope of consent given by Denell. However, there is no evidence that Denell's consent to search the house was limited. Rather, Denell invited the officers into the house and told them that they could look around. Because Denell did not limit the officer's search of the house, it would have been futile for defense counsel to move to suppress the handgun on this basis. Defense counsel is not required to make meritless motions in order to provide the effective assistance of counsel. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

4. Cumulative Effect

Finally, defendant argues that the cumulative effect of the trial court's errors denied him a fair trial. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not. Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002) (citations omitted). Here, because defendant has not shown that his trial counsel's performance was unreasonable or that he was prejudiced by any alleged errors made by trial counsel, we reject defendant's claim that the cumulative effect of multiple errors deprived him of a fair trial.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Jessica R. Cooper